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Nos. 94-923, 94-924

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RUTH O. SHAW, ET AL.

Appellants,

v.

JAMES B. HUNT, JR., ET AL.

Appellees.

JAMES A. POPE, ET AL.

Appellants,

v.

JAMES B. HUNT, JR., ET AL.

Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

BRIEF OF AMICI CURIAE NORTH CAROLINA LEGISLATIVE BLACK CAUCUS AND NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS IN SUPPORT OF APPELLEES

INTERESTS OF AMICI CURIAE

The North Carolina Legislative Black Caucus is a bipartisan organization of African-Americans elected to the North Carolina General Assembly. Among its basic purposes is the promotion of fair and effective represen-

tation for all North Carolina citizens. Its members are elected from single-member districts in which African-American voters are a majority or from multi-member districts which have a substantial plurality of African-American voters. They have consistently supported the principle that all voters should have an equal opportunity to participate in the political process. They may be directly affected by the decision of the Court in this case.

The North Carolina Association of Black Lawyers (NCABL) is an unincorporated professional association operating in the State of North Carolina. One of the purposes of the NCABL is to promote a fair and representative system of government in the executive, legislative, and judicial branches, at all levels. NCABL members are lawyers who reside in and practice law in North Carolina, and law students enrolled in law schools in North Carolina. The NCABL membership is predominantly, but not exclusively, African-American.

Some NCABL members are themselves elected officials in the judicial and legislative branches of state government. Most having been elected from majority-black single-member districts, they have a continued interest in the legal standards controlling the creation of such districts. In addition, other members frequently represent plaintiffs in section 2 litigation at the local level in North Carolina, giving them an important and useful perspective on the issues raised by this appeal.

Counsel for all the parties have consented to the filing of this brief; their letters to that effect have been lodged with the Court.

SUMMARY OF ARGUMENT

The District Court properly rejected appellants' challenge to the composition of North Carolina's First and Twelfth Congressional Districts. For the reasons this Court laid down in *United States v. Hays*, 115 S.Ct. 2431 (1995), none of the appellants even has standing to challenge the First District; only two appellants -- Shaw and Shimm -- have standing to challenge the Twelfth. On the merits, the heart of those appellants' attack on the Twelfth District is a misreading of this Court's earlier decision in *Shaw v. Reno*, 113 S.Ct. 2816 (1993) (*Shaw I*), which appellants misconstrue to impose an independent requirement of aesthetic simplicity on the complex, multivariate balancing through which state political processes determine district boundaries.

Appellants proceed as though the irregular shape of the Twelfth District is not only evidence of a predominant racial motivation, but also a violation of an independent requirement that, in order to be "narrowly tailored" under the Constitution, districts drawn to comply with section 2 of the Voting Rights Act must be regularly shaped. Both components of appellants' argument are incorrect. This Court's precedents, and lower court decisions in keeping with this Court's directions, permit states to subordinate aesthetic regularity of boundaries to other concerns such as political fairness, protection of incumbents, and recognition of identifiable communities of interest. Courts have consistently approved jurisdictions' choices in the face of more compact and "traditional" alternatives because they have recognized that the less compact or more novel plans may better accommodate the state's many competing concerns. Appellants' attack

on the district court's finding that the State's compliance plan was narrowly tailored to the fulfillment of its section 2 responsibilities depends on the denial of these propositions, and thus conflicts with the past decisions of this Court. Contrary to appellants' assumption, "narrow tailoring" is not a term borrowed from couture to describe elegance of line.

Appellants are not even correct in their argument that the irregular shape of the Twelfth Congressional District is unequivocal evidence of the "predominant, overriding" concern with race in the redistricting process that triggers strict scrutiny under *Shaw I* and *Miller v. Johnson*, 115 S.Ct. 2475 (1995). In fact, irregularity of shape is equivocal evidence in the strict sense of the word: under many conditions, including those present in this case, geographic irregularity results from the fact that race is *not* the predominant factor in the districting process. When creating a majority-black district is the single overriding consideration, it is often possible to draw compact and regular districts, as the "illustrative" plans submitted by plaintiffs in section 2 lawsuits show. By contrast, legislative balancing of a mixture of complex considerations -- of which compliance with section 2 is merely one -- can result in irregular and non-compact districting; as this Court has repeatedly held, that complex balancing process is the appropriate business of state and local governments, and under the Constitution federal courts owe substantial deference to the resulting arrangements reached by a legislative majority through the "pull[ing], haul[ing], and trad[ing]" process described by *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994).

Appellants' mistaken reliance on shape is also

valuable in illuminating their lack of an injury in fact sufficient to confer standing. The forces that resulted in the Twelfth District's configuration placed Shaw and Shimm in the district *in spite of*, rather than because of, their race. Considerations other than North Carolina's responsibilities under section 2 -- equipopulousity, partisan concerns, incumbent protection, and the desire to draw distinctively urban and rural districts -- placed Shaw and Shimm in a district less compact than the one that would have resulted from an overriding concern with race. The "racial classification" Shaw and Shimm suffered was the work of the United States Census, without whose entirely constitutional activity in racially classifying the American population all remedial activity under the Voting Rights Act would be impossible. Their presence in the Twelfth Congressional District, however, resulted from non-racial considerations. The "predominant and overriding" consideration, indeed, was this Court's decisions in *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Karcher v. Daggett*, 462 U.S. 725 (1983), requiring that, for purposes of equipopulousity, additional inhabitants, of whatever race, be added to the African-American majority of voters in District Twelve. Because the activity about which appellants complain occurred "in spite of," rather than "because of" their race, under this Court's decision in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), appellants have suffered no real injury.

Even worse than this empirical confusion are the constitutionally illicit premises on which appellants' position ultimately rests. Facing the requirement to show an injury which gives them standing, appellants contend, in the final analysis, that they are "victims" of racial

integration. Appellants ask this Court to interfere in state political processes in order to impose a unique burden on African Americans seeking equality of political opportunity. Under appellants' reasoning, African Americans may seek to vindicate their right to equality of political opportunity only through the creation of *regularly-shaped* majority-black districts, while white people, Republicans, supporters of incumbent office holders -- or any other politically distinct portion of the larger community -- may seek political advantage in the redistricting process by other means, including the creation of irregular districts which, as this Court has repeatedly noted, have been a feature of American political geography time out of mind. Appellants' argument falls afoul of the principle this Court recognized in *Hunter v. Erickson*, 393 U.S. 385 (1969): the Fourteenth Amendment prohibits the government from imposing procedural or substantive barriers to the pursuit of racial equality that are not raised against other objectives in the political process. Appellants claim to be vindicating interests secured by the Equal Protection Clause. But the relief they seek protects no individual right. Instead, it interferes in the political processes of reapportionment protected by our federalism only to deny African Americans an equal ability to participate in democratic self-government.

ARGUMENT

I. Majority-Black Districts May Be Narrowly Tailored Without Being Geographically Compact

Appellants' arguments about district compactness commit a fundamental error of double counting. They assume not only that shape is evidence of a racial motiva-

tion, but also that the Constitution somehow imposes an independent compactness requirement on race-conscious districts. That assumption misunderstands this Court's analysis in *Shaw v. Reno*, 113 S.Ct. 2816 (1993) ("*Shaw I*"), and *Miller v. Johnson*, 115 S.Ct. 2475 (1995). It also flouts an unbroken line of precedent according states substantial leeway in developing plans that comply with constitutional and statutory commands such as one-person, one-vote or section 2 of the Voting Rights Act of 1965. The "complex process" of "reconcil[ing] the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups," *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment), requires states to make tradeoffs among various districting theories and principles. This Court and other courts have consistently permitted states to subordinate aesthetic regularity of boundaries to other state concerns such as political fairness, protection of incumbents, and recognition of identifiable communities of interest. Put simply, if states are permitted to remedy Voting Rights Act violations by drawing noncompact majority-black districts -- and they are -- then North Carolina was entitled to draw the Twelfth Congressional District as part of its legitimate effort to comply with section 2.

A. *Shaw I* and *Miller* Identify a Narrow Role for Evidence Regarding the Shape of Challenged Districts

Geographic compactness plays only a limited role in cases challenging a state's reliance on race in its reapportionment process. *Shaw I* reiterated that compactness, contiguity, and respect for political subdivisions are *not*

constitutionally required. 113 S.Ct. at 2827; *see also Gaffney v. Cummings*, 412 U.S. 735 (1973). Rather, as *Miller v. Johnson* explained, district shape is merely one evidentiary tool for discerning the purpose underlying a reapportionment plan. 115 S.Ct. at 2486-87.

If a reviewing court concludes that race served as "the predominant, overriding factor" in the redistricting process, then the state "must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." *Id.* at 2490. But this narrow tailoring requirement goes solely to the behavior that raises constitutional misgivings: the use of race. In reviewing a state's apportionment choices, the courts "should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'" *White v. Weiser*, 412 U.S. 783, 795 (1973) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)). Thus, if a state has a compelling reason for drawing a majority-black district, federal courts should override the state's choice about which district to draw, and where, only if that choice independently poses constitutional or statutory problems. For example, a reviewing court could properly reject a race-driven plan that contained unnecessary deviations from population equality in violation of *Karcher v. Daggett*, 462 U.S. 725 (1983), or a plan that would consistently degrade the influence of a politically defined group of voters in violation of *Davis v. Bandemer*, 478 U.S. 109 (1986). But strict scrutiny provides no warrant for imposing constraints unrelated to pre-existing constitutional duties. *Cf. Missouri v. Jenkins*, 115 S.Ct. 2038,

2048-49 (1995).[1] Thus, for example, if a federal court were to conclude that a county commission district in the western part of a county failed strict scrutiny, this would provide no warrant for the court to require the county to redraw districts in the eastern part of the county to achieve a 3 percent rather than a 5 percent deviation.

So, too, with compactness. This Court has consistently approved of jurisdictions' remedial proposals even when more compact and "traditional" alternatives were available because it has recognized that the less compact or more novel plans may better accommodate the many competing concerns states have in the redistricting process. As *Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam), explained, federal courts must "reconcile the requirements of the Constitution with the goals of state political policy"; "an appropriate reconciliation of these two goals can only be achieved if the District Court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect."

White v. Weiser, 412 U.S. 783 (1973), provides a particularly salient example of this general principle. There, the plaintiffs showed that the state's legislative districts violated one-person, one-vote. The plaintiffs' proposed remedy was more compact and contiguous than the jurisdiction's. *See id.* at 794. Nonetheless, this

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[1]In *Jenkins*, this Court held that a federal court's remedial authority over a racially discriminatory school system is limited to curing those effects that are the direct vestiges of prior *de jure* segregation. This remedial authority does not extend to ordering the jurisdiction to adopt desirable programs or policies beyond those necessary to cure the violation.

Court held that the state's policy goals, including its desire to protect incumbents, were entitled to substantial deference: "[R]eapportionment is a complicated process. Districting inevitably has sharp political impact and inevitably political decisions must be made." *Id.* at 795-96. Thus, the Court concluded that compactness and other traditional districting principles "do not override" the legislature's policy choices. *Id.* at 796.

The same reasoning applies in *Shaw-Miller* cases. Excess reliance on race, not boundary irregularity, is the relevant injury. Thus, states remain free to choose whatever boundaries they think fit, so long as they do not impermissibly elevate the creation of majority one-race districts over other considerations.

B. Section 2 Provides a Compelling State Interest for Certain Race-Conscious Districting, But Does Not Require States To Draw Compact Districts

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, provides a compelling interest for deliberately drawing majority-black districts. As this Court recognized in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and *Johnson v. DeGrandy*, 114 S. Ct. 2647, 2661 (1994), "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity." As *Gingles* explained, "[t]he essence of a § 2 claim is that a certain electoral law ... interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." 478 U.S. at 47. Thus, section 2

remedies respond, not only to past discrimination, but to the *present-day effects* of prior disenfranchisement and dilution. *See id.* at 44 n. 9 (citing S. Rep. No. 97-417, p. 40 (1982)). The state clearly has a compelling interest in remedying the ongoing effects of its prior deliberate disenfranchisement and dilution.

Of course, section 2 does not require maximization of minority political strength. *See DeGrandy*, 114 S.Ct. at 2659; *cf. Miller*, 115 S.Ct. at 2491. But it does require that minority voters be given an equal opportunity, as well as an equal obligation, to "pull, haul, and trade to find common political ground" in the redistricting process. *DeGrandy*, 114 S.Ct. at 2661. For the reasons we explain in Part III of this brief, requiring racial minorities, but no other group, to seek only compact districts raises practical, and constitutional, concerns. Here, however, we focus on the very limited role compactness plays at the liability and remedy phases of section 2 litigation.

Section 2 requires plaintiffs to show as a threshold prerequisite to establishing liability that the minority group of which they are members is "sufficiently large and geographically compact to constitute a majority in a single-member district," *Gingles*, 478 U.S. at 50; *see also Growe v. Emison*, 113 S.Ct. 1075, 1084 (1993); *DeGrandy*, 114 S.Ct. at 2654-55. But these districts are merely "illustrative"; their admission at the liability phase of a section 2 proceeding says absolutely nothing about whether the defendant jurisdiction must adopt them as a remedy. *See, e.g., Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1054 (D. Md. 1994) (three-judge court); *Jeffers v. Clinton*, 730 F. Supp. 196,

206 n.7 (E.D. Ark. 1989) (three-judge court); *compare, e.g., Ward v. Columbus County, North Carolina*, No. 90-20-CIV-7-BR, slip op. at 20 (E.D. N.C. Dec. 17, 1991) (describing two plans presented by plaintiffs at the liability phase having either one or two majority black districts out of five) *with Ward v. Columbus County, North Carolina*, No. 90-20-CIV-7-BR, slip op. at 3 & 11 (E.D.N.C. Apr. 15, 1992) (approving a plan which, at the jurisdiction's instance, increased the size of the governing body from five to seven and was developed entirely during the remedy proceedings).

Once liability has been found, however, geographic compactness normally drops out of the picture, except to the extent that the plaintiffs argue that the defendant could have drawn additional compact majority-black districts. With respect to the configuration of a new plan, courts must defer to the jurisdiction's choice among possible remedies as long as the jurisdiction presents a proposal that "completely remedies the prior dilution ... and fully provides equal opportunity," S. Rep. No. 94-417, p. 31 (1982). As this Court has repeatedly emphasized, "a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." *Burns v. Richardson*, 384 U.S. 73, 85 (1966); *see also, e.g., McDaniel v. Sanchez*, 452 U.S. 130, 150 (1981); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). Since the Constitution concededly does not demand compactness or regularity of shape, *see, e.g., Shaw I*, 113 S.Ct. at 2827; *Davis v. Bandemer*, 478 U.S. 109; *Badham v. Eu*, 488 U.S. 1024 (1988), *summarily aff'g*, 694 F. Supp. 664 (N.D. Cal.) (three-judge court), states are not required to

draw compact districts in order to remedy a proved section 2 violation.

Perhaps the clearest illustration of this principle came in the remedial proceedings in *Gingles* itself. The district court approved the defendant's remedial districts for Mecklenburg County despite the fact that the plaintiffs' proposed remedy "contain[ed] districts which, on the whole, are significantly more regular in shape than are their counterparts in the state's plan." *Gingles v. Edmisten*, 590 F. Supp. 345, 380 (E.D.N.C. 1984), *aff'd in part, rev'd in part on other grounds*, 478 U.S. 30 (1986). The three-judge court "assume[d], as plaintiffs suggest, that the state's plan reflects a primary concern to protect incumbents that prevailed over any concern to ... insure compactness and cohesion in drawing district lines," but nonetheless adopted the plan because it could not conclude that "the challenged portions of the state's plan ... so seriously and demonstrably impinge upon the voting strength of the residual aggregations of black voters in the affected areas that the plan violates anew the voting rights of those persons." *Id.* at 382.

Since *Gingles*, many other district courts have approved remedies that sacrificed traditional principles such as compactness and contiguity to competing state interests. A few examples will suffice. In *Dillard v. Town of Louisville*, 730 F. Supp. 1546 (M.D. Ala. 1990), for example, the district court approved a defendant's proposed section 2 remedy that involved a noncontiguous district, despite the availability of a multimember district plan that was both compact and contiguous and completely cured the section 2 violation:

> "Louisville designed the plan at issue, and the town apparently believes that the plan, despite its non-contiguousness, accommodates a sense of community within each district. The town's familiarity with its own practical needs warrants substantial deference from the court."

Id. at 1549. *See also, e.g., Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1072, 1074 n.1, 1076 (D. Md. 1994) (three-judge court) (approving the state's remedy proposal -- a "variant" of one of the plaintiffs' proposed districts -- even though it involved a total deviation of 14.8 percent because that plan best accommodated the dual goals of avoiding dilution and protecting incumbents); *Jeffers v. Clinton*, 756 F. Supp. 1195, 1200 (E.D. Ark. 1990) (approving a state-crafted senatorial district over the plaintiffs' objections and their proposed district), *aff'd*, 498 U.S. 1019 (1991). What each of these district courts has recognized is that the "intensely local appraisal of the design and impact" of electoral mechanisms that informs section 2, *Gingles*, 478 U.S. at 79 (internal quotation marks and citations omitted), extends to the remedial stage, and that as long as no voter has his vote denied or diluted, the political branches are better equipped than the judiciary to decide how to balance competing concerns.

There is sound justification for this longstanding remedial practice. *Cook v. Luckett*, 735 F.2d 912 (5th Cir. 1984), a case involving claims of both malapportionment and racial vote dilution, offers perhaps the most detailed analysis. There, the court of appeals reversed the district court's adoption of a plan proposed by private plaintiffs over a plan proposed by the county (and

supported by the NAACP). The county wanted to keep the cores of old districts in creating its new ones and this

> le[ft] district one bizarrely shaped: its western and most of its eastern sections were unchanged, but they were joined by only a narrow corridor that meandered through Canton, at times only a block or two wide. Similar corridors were used to distribute southern Madison County's urban population among districts two and four.

Id. at 915. By contrast, the plaintiffs' plan

> described district lines along much more discernable boundaries than those proposed by the county and created districts shaped much more comprehensibly than the county's 'dumbbell' district one or its extremely narrow district four corridor.

Id. at 916. The district court rejected the county plan because the districts were "contorted" and "fail[ed] on their face to take communities of interest into account." *Id.* But the court of appeals reversed:

> We agree that the county's proposed district lines were more than just odd. Indeed, they seem to us, as they did to the court below, to respond poorly to commonly understood policies that govern apportionment planning. But after Upham [v. Seamon], questions of policy are reserved for legislative resolution. The district court was authorized to alter the county's legislative plan only in those ways necessary to

> remedy a constitutional or statutory vice. Because this record does not support the conclusion that the districts were constitutionally flawed by their bizarre shapes, we hold that the district court erred in rejecting the County Plan on this basis.

Id. at 920. "Apportionments that work no selective disenfranchisement but are merely unwise do not violate the equal protection standards that have developed since Reynolds v. Sims, and their perceived lack of wisdom is not to be corrected in the federal courts." *Id.* at 921. As the court of appeals recognized:

> While the maps depicting its result may seem odd, Madison County's political process involved just the sort of give-and-take between citizens and their elected officials that federal courts are unable to achieve. Unless a showing is made to render that give-and-take somehow suspect, we must acknowledge that process as the proper means toward the essentially political end of reapportionment. As Judge Wisdom has written, "the least representative branch of the government must take care when it reforms the most representative branch."

Id. at 918-19 (quoting *Marshall v. Edwards*, 582 F.2d 927, 934 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979)).

Thus, had North Carolina waited for minority plaintiffs to bring, and win, a section 2 lawsuit before drawing two majority-black districts, it would have been

free to accommodate competing state concerns by crafting irregularly shaped districts. Appellants provide no reason why the state should be more circumscribed in drawing districts to comply with its section 2 obligation prior to suit than afterwards.

Contrary to appellants' contention, there would have been no requirement that the state draw such districts in some particular part of the state. When plaintiffs challenge a statewide apportionment -- as opposed to challenging only a few districts in a particular part of the state, *see DeGrandy*, 114 S.Ct. at 2662 -- the dilution is measured on a statewide basis. *See, e.g., Davis v. Bandemer*, 478 U.S. at 133 (plurality opinion); *id.* at 153 (O'Connor, J., concurring in the judgment); *cf. United Jewish Organizations v. Carey*, 430 U.S. 144, 163-64 (1977) (plurality opinion) (deciding that a countywide dilution claim on behalf of white voters was foreclosed by the fact that the proportion of majority-nonwhite districts was less than the minority proportion of the population). In this case, the district court found that the state drew the two majority-black districts in areas of the state where black citizens' voting strength had been diluted. *See Shaw v. Hunt*, 861 F. Supp. 408, 472 (E.D.N.C. 1994) ("*Shaw II*"). Thus, black voters who were placed with the Twelfth District might well have been successful plaintiffs in a section 2 lawsuit had the state failed to draw any majority-black districts.

Often, there will be many ways of configuring districts to avoid racial vote dilution; in this case, the district court identified "[n]umerous" such plans. *Shaw II*, 861 F. Supp. at 463-64. Virtually all such choices will leave *some* nonwhite voters in majority-white

districts. *See, e.g., Gomez v. City of Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988), *cert denied*, 489 U.S. 1080 (1989); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989); *Gingles v. Edmisten*, 590 F. Supp. at 357-59; *Ward v. Columbus County, North Carolina*, No. 90-20-CIV-7-BR (E.D.N.C. Apr. 15, 1992). But the assignment of many black voters to majority-white districts neither renders the remedy incomplete nor creates a new violation of the Voting Rights Act. Indeed, it tends to negate claims that the districts "segregate" voters or resemble "political apartheid," *Shaw I*, 113 S.Ct. at 2824, 2827. The upshot of a plan such as North Carolina's here -- in which a large proportion of the state's black voters live in majority-white districts -- is to retain racially integrated legislative districts while also producing a racially integrated congressional *delegation*.

But just as black voters who remain in majority-white districts suffer no cognizable injury so long as black voting strength is not diluted, so too white voters who are placed within districts necessary to comply with section 2 have suffered no cognizable injury. As long as states engage in geographic districting, and as long as they choose to draw competitive rather than homogeneous districts, *some* voters will live in districts in which they are members of the numerical minority. In general, this Court has seen these voters as being adequately represented. *See Davis v. Bandemer*, 478 U.S. at 132 (plurality opinion); *see also Thornburg v. Gingles*, 478 U.S. at 99 (O'Connor, J., concurring in the judgment). Absent the kind of special representational harm discussed in Part II or some other constitutional infirmity, voters placed in section 2 compliance districts where they are part of the

racial minority cannot challenge the state's configuration of those districts.

C. A District's Irregular Shape May In Fact Provide Evidence That Race Was *Not* the Predominant Factor in its Creation

Appellants' arguments also ignore a simple fact of apportionment mathematics: the more values that "enter into a legislature's redistricting calculus," *Miller*, 115 S.Ct. at 2488, the fewer the possible solutions. From among the essentially infinite universe of possible plans, one-person, one-vote eliminates some substantial number: only those plans with equipopulous districts will pass constitutional muster. Each additional constraint -- whether protection of incumbents, capture of partisan advantage, compliance with nonretrogression, or recognition of communities of interest (be they racial, economic, occupational, or residential) -- eliminates some of the remaining possible districting schemes. Inevitably, states must make tradeoffs.

Paradoxically, if creating majority-black districts is the state's predominant concern, it becomes far easier to craft regularly shaped districts than if other concerns -- like the safeguarding of incumbency and partisan advantage or the concern with reflecting distinctively rural or urban interests that drove the North Carolina process -- predominate. If majority-black districts are drawn first, such districts may actually be *more* regular than comparable majority-white districts. This point is clearly illustrated by the California plan this Court summarily approved last Term in *DeWitt v. Wilson*, 115 S.Ct. 2637 (1995). As the Special Masters who drew the plan

explained, "[h]aving *first* constructed Latino and African-American congressional and state legislative districts ... the *remainder* of the districts allocated to Los Angeles County had to be constructed around the periphery; in some instances *they* became rather elongated. *See Wilson v. Eu*, 823 P.2d 545, 579-80 (Cal. 1992) (emphasis added).

Ironically, the irregularity of a district's shape may in fact be powerful evidence that racial considerations, while undoubtedly present, did *not* predominate and instead were part of a complex calculus. Three criteria omitted from *Miller*'s list of "traditional" districting principles -- equipopulousity, partisan advantage, and incumbent protection -- are virtually sure to loom larger in the legislature's redistricting calculus and may produce irregular majority-black districts. In Texas, for example, the legislature declined to draw an extremely compact majority-black district in Dallas because two white, incumbent Democrats each wanted to keep substantial numbers of reliably Democratic black voters in their districts. *See Vera v. Richards*, 861 F. Supp. 1304, 1321, 1338 (S.D. Tex. 1994) (three-judge court), *probable juris. noted*, 63 U.S.L.W. 3917 (June 29, 1995). The shape of the newly created majority-black district -- which was essentially slipped into territory grudgingly ceded by the two white incumbents, and which had to reach out tentacles to incorporate pockets of white (not black) voters necessary to reach the ideal district population -- reflects not the dominance but the secondary consideration of the black community's interest. *See also Miller*, 115 S.Ct. at 2503-04 (Ginsburg, J., dissenting) (describing various political considerations that explain parts of the Eleventh District's shape).

In this case, the shape of the Twelfth District reflects this very dynamic. The district court found that the General Assembly was "specifically aware" of "[n]umerous plans" that "demonstrated that the state's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts." *Shaw II*, 861 F. Supp. at 463. Had the state's sole concern been with creating a majority-black district, it could have drawn one with a considerably more regular shape. *See id.* at 463-64. But various incumbency and partisan interests, as well as the desire to draw an urban district, outweighed aesthetic concerns. *See id.* at 465, 468, 469. The district court's findings were entirely justified by the record, and appellants do not seriously argue that they were clearly erroneous.

For the reasons advanced by the Gingles appellees, we believe that these factual findings should defeat appellants' invocation of strict scrutiny: the facts show that race was just one among many factors taken into account in crafting the North Carolina congressional map. But even if strict scrutiny is warranted, the state should remain free to satisfy its compelling interest in adherence to section 2 of the Voting Rights Act by crafting non-compact districts.

II. Federal Courts Should Overturn a Reapportionment Plan Only When Plaintiffs Prove the Special Representational Harms Identified in *Shaw I*

As we explained in Part I, federal courts should act with great circumspection in overturning the results of the intensely political redistricting process. Concerns for state political autonomy require that courts intervene on

behalf of individuals whose votes have been neither denied nor diluted only when they plead *and prove* the special representational harms identified in *Shaw I*. Otherwise, the Court will permit lawsuits based on a "generalized grievance against governmental conduct," *United States v. Hays*, 115 S.Ct. 2431, 2436 (1995), simply because of the fortuity that the individual with that generalized grievance happens to live in a majority-black legislative district.

To understand why this is so requires considering the relationship among the three "irreducible" elements of standing: an "injury in fact"; "a causal connection between the injury and the conduct complained of"; and the likelihood that the injury "will be redressed by a favorable decision." *Hays*, 115 S.Ct. at 2435; *see also, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984). First, appellants Shaw and Shimm -- the only plaintiffs with even a semblance of standing[2] -- have never shown that "they, *personally*, have been subjected to a racial classification." *Hays*, 115 S.Ct. at 2433 (emphasis added). In fact, they were placed in the Twelfth District

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[2]It seems entirely to have escaped appellants' notice that, in light of this Court's decisions in *United States v. Hays* and *Miller v. Johnson*, none of the seventeen appellants has standing to challenge the state's decision to draw a majority-black First Congressional District -- since none of them lives anywhere near that district -- and that three of the Shaw appellants and *all* of the Pope appellants lack standing altogether. *See Shaw I*, 113 S.Ct. at 2821 (two of original appellants live in the Twelfth District and three live in the Second District). This utter lack of standing justifies, by itself, affirmance of the district court's judgment with respect to the First District.

primarily in order to create a district whose total population satisfied the one-person, one-vote requirement of the Fourteenth Amendment and whose residents shared relevant economic and nonracial demographic characteristics. Once the General Assembly had crafted a district that provided black voters with an equal opportunity to elect the candidate of their choice, it was entirely indifferent as to the race of the other voters whose residences placed them within the district. In doctrinal terms, Shaw and Shimm were, if anything, put in the district "in spite of," and not "because of," their race. *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979).

Shaw and Shimm's real claim rests instead on the assertion that the state's deliberate placement of *black* voters within the district in which they live has somehow adversely affected them, since had they lived in an identically shaped district that was 55 percent white, they would have had no constitutional peg on which to hang their grievances. Without proof of a representational injury, however, this claim looks perilously close to an assertion that the plaintiffs have been injured by racial integration -- or at least racial integration in which whites do not remain the predominant group. Nothing in this Court's opinions suggests that racial integration gives rise to a cognizable injury on the part of individuals placed in a majority other-race setting.

In any event, appellants' injury in fact must consist of more than simply being classified on the basis of race, since the government constantly *classifies* individuals on the basis of race. *See, e.g.*, Jury Selection Act of 1968, 28 U.S.C. § 1869(h) (1988) (requiring that juror qualification forms "elicit" a juror's race); Office of Manage-

ment and Budget, Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting (1977) (providing for the pervasive collection and use of data involving racial classifications). No court has ever required a heightened justification for using race in this fashion. The danger arises not from the government's awareness of race, *cf. Shaw I*, 113 S.Ct. at 2826, or even its *use* of race -- indeed, but for the census' dissemination of race-based data, it would be impossible for appellants or this Court to know the racial composition of the challenged districts -- but from its use of race as a criterion for allocating benefits and burdens among citizens. That is why *Feeney* requires that a plaintiff show that the government adopted or maintained the challenged practice "at least in part 'because of,' not merely 'in spite of,' *its adverse effects* upon an identifiable group." 442 U.S. at 279 (emphasis added).

The analysis in *United States v. Hays*, 115 S.Ct. 2431, rests on this understanding. There, the Court premised its holding that residents of a legislative district have standing to challenge the deliberate use of race in drawing the district on "the special representational harms racial classifications can cause in the voting context." *United States v. Hays*, 115 S.Ct. at 2436. Absent these representational harms, or any denial or dilution of the right to vote, an individual's challenge to a legislative reapportionment scheme reflects "only a generalized grievance against governmental conduct of which he or she does not approve." *Id.* Moreover, as long as the government is entitled to take race into account -- and *Miller* and *Shaw I* permit deliberately using race "when members of a racial group live together in one communi-

ty" and share "some common thread of relevant interests," 115 S.Ct. at 2490; 113 S.Ct. at 2826 -- plaintiffs such as Shaw and Shimm cannot show redressability, since even if the particular plan before the court is struck down, they may nonetheless be subjected to race-conscious districting.

In this case, the district court found *no* representational harms. It specifically "discount[ed]" appellants' claim that the Representative from the Twelfth District failed to consider their needs. *Shaw II*, 861 F. Supp. 472 n. 59. It characterized their self-described injuries as "abstract, theoretical, and merely speculative, not concrete and palpable." *Id.* at 424. And it found that challenged districts were

> based on rational districting principles that ensure fair and effective representation to all citizens covered by them, since they are deliberate designed to be and are in fact highly homogeneous in terms of their citizens' material conditions and interests, and do not significantly inhibit access to and responsiveness of their elected representatives.

Id. at 475. Under these circumstances, Shaw and Shimm -- like the other appellants -- have suffered no personal, concrete injury that justifies enabling them to enlist the federal courts in overturning North Carolina's considered judgment that the its plan best accommodates the competing interests at play in the reapportionment process.

III. Requiring States To Maximize the Compactness of Majority-Black Districts Poses Serious Pragmatic and Constitutional Dangers

To require states that seek to meet their affirmative obligation under the Voting Rights Act to ensure equal political and electoral opportunity[3] also to achieve the greatest possible regularity of shape for majority-black legislative districts will be both counterproductive and, ultimately, constitutionally problematic.

First, if only the most regularly shaped district can pass muster, then "narrow tailoring" paradoxically *forces* states to treat race as a "predominant," "overriding" factor, since it demands that the state draw aesthetically regular majority-black districts even if this means "subordinating" other concerns such as protection of incumbents, partisan allocation of seats, and recognition of other cognizable communities of interest. In other words, it is the requirement that majority-black district be regularly shaped, and not the intentional drawing of such districts, that sacrifices other interests to race. And the requirement that minority districts be drawn first, rather than as part of the overall apportionment process, obviously poses dangers of exacerbating racial polarization in the political process.

Second, if the state can recognize the claims of

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[3] *Cf.* 42 U.S.C. § 1973b(a)(1)(F) (1988) (requiring covered jurisdictions that seek to bail out from the preclearance requirement to "eliminate voting procedures or methods of election which ... dilute equal access" and to "engag[e] in other constructive efforts").

minority voters only by sacrificing the claims of other groups, the legislature is far less likely to recognize black voters' claims in the political redistricting process. Thus, requiring regularity may lead states to sacrifice minority political interests that they would otherwise be willing to recognize because it will hamstring states from satisfying both minority concerns and other interests. This means that minority voters will be less likely to achieve their goals through the "pull[ing], haul[ing], and trad[ing]" process celebrated by *DeGrandy*, and more likely to have to seek creation of equal opportunity districts through the litigation process or through appeals to the Department of Justice during the preclearance process, with the attendant problems of federal intervention in this essentially local political activity. And even once litigation ensues, forcing defendants to draw aesthetically pleasing districts may hinder the settlement process, in which plaintiffs and jurisdictions might otherwise craft innovative remedies that better accommodate all their competing interests. *See, e.g., Town of Louisville*, 730 F. Supp. 1546 (approving a consensual noncontiguous district plan); *Montgomery County Branch of the NAACP v. Montgomery County, North Carolina*, No. C-90-27-R (M.D.N.C. Jan. 23, 1990) (approving a consensual plan using a multimember district and candidacy restrictions).

Third, to require greater regularity for majority-black districts than for other districts would itself raise constitutional problems. In *Hunter v. Erickson*, 393 U.S. 385 (1969), this Court struck down a provision of the Akron City Charter that made it more difficult to obtain anti-discrimination legislation than other forms of legislation. The Court explained that "the State may no more disadvantage any particular group by making it more difficult

to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.* at 393.

Requiring members of racial minorities, but not other groups, to seek only districts with a regular configuration would be equally unconstitutional. Such a requirement would clearly run afoul of *Hunter*, because it would treat voters who politically affiliate along racial lines differently from voters who choose to affiliate along other shared characteristics, and would make it more difficult for them to secure favorable apportionment plans. As we have already explained, such a stricture would make it more difficult for black voters than for other groups to enact favorable apportionment legislation, since it would constrain their available options in ways that other groups' options were not constrained.[4] To require districts sought by the black community to be more regular than districts obtained by other identifiable groups would turn the Fourteenth Amendment on its head, making the Amendment's original intended beneficiaries -- black Americans -- the only group whose political aspirations are stringently limited by considerations of compactness and regularity of district boundaries. For federal courts to impose such a policy runs afoul of the equal protection component of the Due Process Clause of the Fifth Amendment.

As *Shaw I* recognized, all legislators are inevitably *aware* of the racial and demographic composition of the

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[4]Surely a statute that provided that "a majority-white district may be any shape but a majority-black district must be regular in its boundaries" would be unconstitutional.

constituency they represent. 113 S.Ct. at 2826. This will be true whatever the configuration of their district. Thus, to the extent that the racial composition of a district signals to its representative how he should approach his task, "[t]he message will be the same regardless of the shape of the envelope in which it is sent." Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 Sup. Ct. Rev. 345, 381. To suggest that representatives from majority-black districts do not represent all their constituents as fairly as representatives from majority-white districts do is precisely the kind of offensive stereotype the Fourteenth Amendment condemns. *See Miller*, 113 S.Ct. at 2486. But to say that appellants Shimm and Shaw have suffered a "representational injury" simply by virtue of being placed in a majority-black district rests, at bottom, on precisely this noxious reasoning. How, precisely, are they less well represented? They have provided no evidence to show that their congressman fails to provide constituent services on a nondiscriminatory basis; indeed, there is none. And to the extent that Representative Watt or other black legislators bring to legislative deliberations distinctive "qualities of human nature and varieties of human experience," *Taylor v. Louisiana*, 419 U.S. 522, 532 n.12 (1975), that stem from their status as African Americans, what appellants really are claiming is that somehow they are injured when these previously excluded voices are added to the chorus. This Court should see appellants' "invocation of the ideal of a 'color-blind' Constitution," *Shaw I*, 113 S.Ct. at 2824, for what it really is: an argument that they are somehow denied their legitimate expectations by being forced into a district in which black voters as well as white enjoy an equal opportunity to participate in the political process and elect

candidates of their choice. All North Carolinians, including appellants, are in fact better served by the outcome of the most recent reapportionment, since its results are more truly representative than any in the past century.

CONCLUSION

Amici urge this Court to affirm the judgment of the United States District Court for the Eastern District of North Carolina.

Respectfully submitted,

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